

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

COMMONWEALTH EDISON COMPANY	)	
	)	
Petition for approval of delivery services tariffs and	)	Docket No. 01-0423
tariff revisions and of residential delivery services	)	
implementation plan and for approval of certain	)	
other amendments and additions to its rates, terms,	)	
and conditions.	)	

**RESPONSE OF COMMONWEALTH EDISON  
COMPANY TO MOTION TO COMPEL**

Commonwealth Edison Company (“ComEd”), by its counsel, hereby responds to the motion to compel (the “Motion”) filed by the Attorney General’s office (the “AG”), the City of Chicago (the “City”), and the Citizens Utility Board (“CUB”). The Motion in certain material respects does not fairly, accurately, and completely state the relevant facts, nor how the law should be applied to those facts. Also, the Motion is improper (premature) as to the AG’s second set of data requests. The Motion should be denied. ComEd is willing to agree to deadlines for the small number of actually pending items at issue, as discussed further below.<sup>1</sup>

**INTRODUCTION**

The Motion seeks to paint a picture of ComEd failing to diligently respond to discovery and as a result partially hampering the movants’ participation in this proceeding. The facts simply are to the contrary. In the Discussion section of this Response, ComEd makes the following seven points:

- ComEd has been conscientious in responding to discovery. To date, ComEd has responded in a timely manner to all but a tiny fraction of the data requests served on it. ComEd has provided fair responses, with appropriate objections where

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<sup>1</sup> As of the evening of August 27, 2001, ComEd and the AG continued to discuss an agreed resolution of their disputes as to the AG’s first set of data requests. Many or all of the disputes may be resolved by agreement. As of the morning of August 28, 2001, ComEd and the City have reached an agreed resolution of their disputes as to the City’s data requests at issue in the Motion. ComEd is filing this Response as a protective measure to ensure that its positions are reflected in the record.

needed. The Motion cites alleged examples of non-responsiveness that only prove that the Motion's assertions lack merit.

- The AG and the City bear principal responsibility for the situation about which they now complain. They waited nearly two months before issuing any data requests. Under the Illinois Commerce Commission's (the "Commission") Rules of Practice, data requests, as well as the responses thereto, "shall be made in a timely fashion...", and "[n]o such request shall delay any proceeding in the absence of a showing that the requester has exercised due diligence and that the delay will not cause undue prejudice." 83 Ill. Adm. Code § 200.410(a). Under those standards, the Motion plainly fails.
- The AG and the City stalled for several days before actually responding to ComEd's reasonable entreaties that the AG and the City prioritize their data requests.
- The AG and the City crafted their data requests apparently without taking into account duplicative and overlapping data requests already served on ComEd by other parties, and the Motion largely does the same.
- The AG's specific complaints about ComEd's responses to the AG's data requests lack merit. The AG's data requests as initially served were vastly overbroad, in large part irrelevant, and unduly burdensome. ComEd and the AG have negotiated various limitations on and clarifications of these requests, but the negotiations have taken time and the data requests even as limited still are very demanding in terms of the number of documents that have had to be located, reviewed, and produced or made available.
- The Motion is improper as to the AG's second set of data requests. Responses are not yet due and the AG and ComEd are discussing these requests.
- The City's specific complaints about ComEd's responses to the City's data requests also lack merit. For example, the Motion leads off with the City's complaint about the alleged non-responsiveness of ComEd's response to City data request 41, but ComEd's response is correct and complete. If the City does not like the response, that does not mean that it is incorrect or incomplete. For another example, the Motion complains about ComEd's not responding to City of Chicago data requests 60, 61, and 62, but the Motion omits that City data requests 16, 17, and 18 asked ComEd the identical questions and ComEd timely responded there.

The Motion, accordingly, should be denied. Again, however, ComEd is willing to agree to deadlines for the small number of actually pending items, as discussed further below. *See also* footnote 1, *supra*, as to the status of discussions and agreed resolutions.

## DISCUSSION

In view of the expedited nature of the proceedings on the Motion, ComEd is presenting this short discussion of the many flaws of the Motion. The Motion does not justify the relief sought.

1. ComEd has been conscientious in responding to discovery. ComEd has received approximately 970 numbered data requests containing, in reality (considering subparts and multiple questions asked in individually numbered data requests), well over 2,000 data requests. More than 250 of the numbered data requests, many rich with multiple questions and “subparts”, have come from the City in five successive waves. To date, ComEd has responded in a timely manner -- within the 28 days allowed by 83 Ill. Adm. Code § 200.410(b) -- to all but a small fraction of the data requests served on it by the movants and other parties, including responding to all of the AG’s first set of data requests, as is discussed further below. ComEd has expended literally thousands of person-hours of work in order to do so. ComEd’s responses have been fair responses, with appropriate objections where needed.

The Motion incorrectly asserts that ComEd agreed that it would respond to all data requests within 14 days. (Motion, § 4, ¶ 1). ComEd never made any such agreement, as the transcript of the status and scheduling hearing held on June 28, 2001, confirms. What ComEd did indicate was that it would make a good faith effort to respond to data requests within 14 days. ComEd has made that effort, despite the fact that since that hearing it has been inundated with unreasonable numbers of data requests, many of which are irrelevant and unduly burdensome. In fact, ComEd has responded to numerous requests well in advance of when legally they were due, including most of the AG’s data requests.

Moreover, the Motion's "14 days" complaint is seriously undercut by the AG's and the City's own conduct. The AG and the City have not responded to ComEd's minimal set of just five numbered data requests (plus a sixth -- "me, too" -- data request) served on the AG and the City 18 days ago, and to which ComEd requested responses by August 23, 2001.

2. The AG and the City bear principal responsibility for the situation about which they now complain. ComEd filed its direct case, and served it on potential parties, on June 1, 2001. The AG and the City waited nearly two months before issuing data requests. (CUB has served only a "me, too" data request.) The City elected not to serve its first set of data requests until July 23, 2001. ComEd did not receive the AG's first set of data requests until July 26, 2001. ComEd was legally entitled to 28 days to respond, as noted above. 83 Ill. Adm. Code § 200.410(b). 28 days after July 23, 2001, was August 20, 2001. Thus, the City by serving its data requests as late as it did created a situation in which responses legally were due just three days before its testimony was due. The AG, by serving its data requests as late as it did, created a situation in which responses legally were due on the day its testimony was due.

Under the Commission's Rules of Practice, data requests, as well as the responses thereto, "shall be made in a timely fashion...." 83 Ill. Adm. Code § 200.410(a). Moreover, under the Rules: "No such request shall delay any proceeding in the absence of a showing that the requester has exercised due diligence and that the delay will not cause undue prejudice." 83 Ill. Adm. Code § 200.410(a). Under those standards, the Motion fails.

ComEd is not arguing that the AG's and the City's data requests failed to meet any due date set by the Administrative Law Judges. No such deadline was set. However, the AG and the City had no legal right to expect that they would receive responses to each and every one of their first sets of data requests substantially before their testimony was due. The fact that they

received responses to all but a relatively small number of their data requests is not grounds to delay this proceeding.

3. The AG and the City stalled for several days before actually responding to ComEd's reasonable entreaties that the AG and the City prioritize their data requests. As the Motion acknowledges, on July 26, 2001, ComEd asked the AG, the City, and other parties to prioritize their data requests. (Motion, § 3, ¶ 2). The AG and the City each stalled, each illogically asking that ComEd first perform and provide an analysis of which of their data requests were most burdensome, which the Motion inaccurately characterizes as a request for "clarification". (*Id.*) The AG did not provide such a list until July 31, 2001, and then listed nearly half of the data requests in its first set as "priorities". (*Id.*) The City did not provide such a list until August 2, 2001, and then listed nearly 80 data requests as priorities. (*Id.*)

4. The AG and the City crafted their data requests apparently without taking into account duplicative or overlapping data requests already served on ComEd by other parties, and the Motion largely does the same. The AG and the City, when formulating their data requests, appear not to have considered at all the numerous data requests that already had been served on ComEd by other parties, and, in particular, by numerous of the Commission's Staff ("Staff"). The AG and the City made no apparent effort to avoid duplicating or overlapping pending data requests of other parties. That approach to discovery is extremely problematic, because as to any given subject, the number of ComEd personnel who are in a position effectively and completely to respond to data requests may be very few, sometimes even one person, each of whom also has duties in their role as an employee of an operating electric utility. Moreover, performing multiple reviews at the same time of the same documents can be difficult, and sometimes essentially impossible. That problem was especially severe because the AG's data requests as

initially formulated (before the negotiated limitations) asked for huge swathes of ComEd documents from all across ComEd going back in numerous instances as much as over a decade.<sup>2</sup> The Motion likewise fails to recognize the practical difficulties that have resulted from this duplication and that have slowed down the process of responding to data requests.

5. The AG's specific complaints about ComEd's responses to the AG's data requests lack merit. As indicated above, the AG's data requests as initially served were vastly overbroad, in large part irrelevant, and unduly burdensome. As also indicated above, ComEd and the AG have negotiated various limitations on these requests, but the negotiations took time and the data requests as limited still were very demanding in terms of the number of documents that had to be reviewed, identified, and produced or made available.

On August 27, 2001, ComEd issued a revised set of written responses to the AG's first set of data requests (a genuine copy of which is attached hereto except for the confidential portions). Moreover, as ComEd has discussed with the AG's counsel, and as indicated above, ComEd has voluminous documents available for inspection by the AG's counsel and its witness. The AG's complaint that, because it retained a witness from Massachusetts, it is unreasonable for ComEd to produce assembled documents in conference rooms at the ComEd locations where they are kept (Motion, § 3, ¶ 8) is unreasonable on its face. For a respondent in discovery to make available voluminous documents where they are kept is a standard, reasonable practice in litigation, and no fact here makes it unreasonable, especially given that ComEd has needed access to the documents in order to address other parties' data requests. The AG since has agreed to inspect documents at ComEd's facilities beginning tomorrow.

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<sup>2</sup> For example, AG data request 1.27 asked for "copies of any distribution system planning studies prepared by or for the Company since January 1, 1998," a request that would have required canvassing and producing files from every one of ComEd's systems and field planning engineers in the last three years.

The AG's specific complaints about ComEd's responses to the AG's data requests are without merit. Indeed, those complaints to a substantial degree appear to rest on a misunderstanding both of the testimony cited and of ratemaking principles.

For example, the Motion indicates that its position is based in part on the theory that rate base items in a proposed revenue requirement are to be analyzed to determine if they "represent a typical test year". (Motion, § 3, ¶ 11; *see also* Motion, § 3, ¶ 12; Motion, § 3, ¶ 1, *et seq.*) That, of course, reflects grave misapprehension of the subject. Rate base items are not analyzed on a test year "snapshot" basis. Rate base items are cumulative investments. While, in brief, a historical test year cuts off the calculation of rate base items, subject to appropriate adjustments, ratemaking as to rate base items simply does not involve the type of analysis that the Motion erroneously assumes to be employed.

For another example, the Motion misconceives the testimony of Ms. Arlene Juracek. The Motion quotes her testimony as to the "extensive evaluation of reliability of its transmission distribution systems..." that ComEd has conducted, implying that she was referring to a single particular evaluation process. (Motion, § 3, ¶ 11). In her testimony and in data request responses it is quite clear that Ms. Juracek was referring to work that ComEd performs on a day-to-day basis as an operating electric utility and that is memorialized in literally thousands of documents.

The AG's insistence that it needs more than a decade's worth of data on ComEd budgets and expenditures going back to 1990 also rings hollow. (Motion, § 3, ¶ 12). The AG ignores the intervening ComEd bundled and delivery services rate cases during that period as if they never occurred. Moreover, the AG ignores that what is pending before the Commission in this proceeding are jurisdictional costs of providing delivery services, that ComEd has not split its

transmission and distribution budgets along jurisdictional lines, and that ComEd has not refunctionalized the expense data from nearly all of those years, which would be extremely burdensome, if not impossible, as to the earlier years given the lapse of time. ComEd is not arguing that 100% of this data is so irrelevant as to make data requests seeking it not reasonably calculated to lead to the discovery of admissible evidence, but ComEd is indeed objecting that the scope of the data requests as initially formulated is far too broad, irrelevant, and unduly burdensome.

The AG's complaint about ComEd's response to AG data request 1.01(h) provides another illustration of what at times seems almost a willful failure to comprehend ComEd's data request responses. (*See* Motion, § 3, ¶ 13). The AG fails to grasp a very simple point that ComEd made in its response: Subpart (h) of AG data request 1.01 as drafted apparently and quite unreasonably effectively called for every document ComEd has supporting each dollar of ComEd's rate base and operating expenses in its proposed revenue requirement.

The AG's complaint about ComEd's response to AG data requests 1.01(i), (j), and (k) offers another example. (*See* Motion, § 3, ¶ 14). The AG again fails to grasp a very simple point that ComEd made in its response: A quantitative breakdown of cost-causation along the lines requested in those subparts simply does not exist and, as a conceptual matter, misconceives the referenced testimony and the underlying facts.

The AG's complaint about ComEd's response to AG data request 1.26 also lacks merit. (Motion, § 3, ¶ 8). That request calls for hundreds of system planning studies. ComEd quite reasonably provided representative examples to the AG, assembled additional such studies for major projects for review at ComEd's offices, and offered to make other studies available, to the extent that they exist, upon request. That is more than reasonable. In contrast, under these



circumstances, the AG's complaint that ComEd has not scoured its files to verify that there is such a study available for every single one of the hundreds of projects related to this data request (*id.*) is not reasonable.

6. The Motion is improper as to the AG's second set of data requests. Responses to the AG's second set of data requests are not yet due, because the requests were served on Friday, August 3, 2001, by overnight delivery, making responses not actually due until September 4, 2001. 83 Ill. Adm. Code § 200.410(b). Moreover, the AG and ComEd are discussing these data requests, and thus the AG has not satisfied all of the prerequisites for filing a motion to compel as to these requests. 83 Ill. Adm. Code § 200.350.

7. The City's specific complaints about ComEd's responses to the City's data requests also lack merit. The Motion leads off with the City's complaint about the alleged non-responsiveness of ComEd's response to City data request 41, but ComEd's response is correct and complete. (Motion, § 2, ¶¶ 1-3). ComEd's response indicated that the particular figure about which City data request 41 inquired was a "reconciling adjustment...." (*Id.*) That is a perfectly sensible, comprehensible, and accurate explanation. If the City does not like the response, that does not mean that it is anything other than correct and complete.

The Motion complains about ComEd's not responding to City data request 9. (Motion, § 4, ¶ 5). That data request simply asked for copies of certain pages of certain of ComEd's FERC Form 1s, which are publicly available documents. In any event, ComEd recently has provided the requested pages.

The Motion also complains about ComEd's not responding to City data requests 60, 61, and 62. (Motion, § 4, ¶ 5). The Motion omits that City data requests 16, 17, and 18 asked the

identical questions and that ComEd timely responded to those requests. In any event, ComEd recently has issued responses to City data requests 60, 61, and 62, making those cross-references.

ComEd also has responded to various of the other City data requests that the City identifies as outstanding, either directly or in substance by responding to other data requests of the City or other parties. ComEd is willing to agree to respond or appropriately object to any outstanding data requests of the City in its first and second sets of data requests that are identified in the Motion on or before Friday, August 31, 2001.

THEREFORE, Commonwealth Edison Company respectfully requests that the Motion be denied.

Dated: August 28, 2001

COMMONWEALTH EDISON COMPANY

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